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To: Microsoft ATR
Date: 1/28/02 12:51pm
Subject: Microsoft Settlement

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Introduction

As a software engineer with 25 years experience developing software, mostly for personal computers, I would like to comment on the Proposed Final Judgement in United Stated vs. Microsoft.

I believe that The Federal Government is attempting to achieve a remedy that infringes as little as possible on the market, while trying to stop illegal conduct. I applaud that attempt and think that was just what you should have been trying to do. I think, however, that the Proposed Final Judgement fails to stop the illegal conduct and should be rejected in its present form.

I am not looking for the federal government to pick winners and losers in the marketplace. I want my federal government only to ensure that fair competition will let the marketplace decide the winners. At the very least, any part of this agreement should be neutral in its effect on further entrenching Microsoft's monopoly. And since this agreement is supposed to be a remedy for illegal conduct, it should lean slightly to the effect of opening the market in order to remedy past wrongs. Then, and only then, the free and fair market can benefit the consumer.

As your own Competitive Impact statement says

> "The District Court held that Microsoft engaged in a series of illegal anticompetitive acts to protect and maintain its personal computer operating system monopoly, in violation of Section 2 of the Sherman Act and analogous state laws."

Failures of the Proposed Final Judgement

1) Section III.D states

> "Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms..."

The problem here is that Microsoft, as a monopolist, is setting standards for the industry. For a competitor to arise, interoperability must be possible. Restricting this API information for the sole purpose of interoperating with a Windows Operating System Product only entrenches the monopoly. There is no legitimate purpose served by restricting this interoperability to only Windows Operating Systems. For example, a competing middleware product may ask for these APIs so they can make their product compatible with both Microsoft Operating System Product and its competitors. Microsoft could refuse and thus their product tying would have succeeded in stifling competition. If Section III.D is to have the effect of fairly documenting these interfaces to stop the tying, the section quoted above should read:

> "Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, via the Microsoft Developer Network ("MSDN") or similar mechanisms..."

2) Section III.E states

> "Microsoft shall make available for use by third parties, for the sole purpose of interoperating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol"

This is a similar failure to number 1, but more serious. These communications protocols need to be documented so that any competing operating system may use them. Microsoft's monopoly does not currently extend to the server market. If Microsoft were to gain a server monopoly by the quality of their product offering, that is fine. If they gain it by tying
the server market to their current monopoly, that is the same kind of

improper behavior that brought about this case. This judgement should not encourage that improper behavior and so this section I quote should be changed to read:

"Microsoft shall make available for use by third parties, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol"

3) Section III.G.2 states

"on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware."

This is too narrowly drawn and to use a metaphor, confuses the cart with the horse. The illegal conduct was the attempt to preserve the monopoly on operating systems. Middleware was the tool used to preserve the monopoly. Microsoft should not discriminate against businesses that encourage the use of other Middleware, but they should not discriminate against businesses that encourage other operating systems, either. If the phrase "Microsoft Middleware" were replaced with "Microsoft Platform Software", this would have meaning. With the phrase "Microsoft Middleware" in place, an IAP encouraging the use of Linux, BSD or other competitive operating systems could be discriminated against.

4) Section III.H.2(second 2) states

"(e.g., a requirement to be able to host a particular ActiveX control)"

This is a terrible example and significantly lessens the likely intent of this paragraph. Hosting ActiveX controls is not a technical requirement. It is an implementation using a proprietary method. A reasonable technical requirement should not necessitate the use of Microsoft development tools. The only slightly reasonable point here is that ActiveX has been around long enough that there are a few alternative tools. I am not sure whether it is possible to build ActiveX controls withoutout the use of Microsoft development tools. If it is not, ActiveX should definitely go as an example.

5) Section IV.B.9 states

"prohibiting disclosure of any information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than Microsoft, the Plaintiffs, or the Court."

As worded, the TCs will not even be able to communicate important information to their staff or other TCs. There is also no reason to protect information about improper business practices by Microsoft. This should be amended to read

"prohibiting disclosure of any proprietary information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than other TC, the TC staff, Microsoft, the Plaintiffs, or the Court."

6) Section IV.B.10 states

"No member of the TC shall make any public statements relating to the TC's activities."

This sentence should go. The purpose of the TC is to apply pressure to Microsoft to stay within the law. Secrecy does not serve that purpose. A better clause would read

"The TC shall make quarterly public reports. These shall be available on a web pages provided by Microsoft. Microsoft may fufill this requirement by hosting the web pages or paying for their hosting elsewhere, as long as the web pages are generally available."

7) Section IV.C.3.h states

"maintaining a record of all complaints received and action taken by Microsoft with respect to each such complaint."

The purpose of this judgement is to end the illegal practices of the past. Light must be shed on questionable practices and credit should be given to improvements in behavior. These records should be easily accessible to all and the best way to do this is the change this sentence to read

"maintaining and publishing on a public website at the expense of Microsoft a
record of all complaints received and action taken by Microsoft with respect to each such complaint."

8) Section IV.D.3.c states

"Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC of the nature of the complaint and its disposition."

There is no feedback mechanism here to ensure that complaints are actually resolved. The complaintant should also be notified by Microsoft. If the resolution is unsatisfactory, then the complaintant would be prepared to take appropriate action. This should read

"Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC and the complaintant of the nature of the complaint and its disposition.

9) Section IV.D.4.d states

"No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment."

This is completely unreasonable if the issue is a further proceeding involving this matter. If the TC finds out about illegal behavior, they should have a duty to report it and stand behind their claims.

Conclusions

The final judgement as it now stands will only make things worse for the following reasons.

1. After this suit is ended, there will be tremendous pressure to leave Microsoft alone and see if the judgement leads to a free market. If the judgement is a reasonable one, I would join in protesting actions against Microsoft.
2. The failures of this judgement mean that the illegal and unsportmanlike conduct of Microsoft will likely continue. Because the people who may see the evidence, i.e. the TCs, must keep silent, we will have to wait until great harm is done before we will realize it.
3. That means real competition is less likely to get its foot in the door and offer real chice to the public. This is what really drives me. I think that if Microsoft wins a fair fight in the marketplace, then we are all better off. When they use their monopoly position to keep entrants out of the market, I think everyone but Microsoft loses. I wish Microsoft was prepared to fight a fair fight, but their history tells me they won't.

I really do think kudos are in order on this attempt at a Final Judgement. It is better than I expected in many ways. The breaking up of the company, as proposed at one time was too great a punishment and I am glad to see that solution is gone. In spite of my optimism at what I first heard about this agreement, a careful reading leads me to say that this proposed judgement is not good enough. Because of the significant failures I addressed above, this agreement will not serve to undo any past wrongs and I strongly believe it will only make things worse. With a few changes, it could serve the public interest and not

unnecessarily impinge on the rights of a great American corporation. If the only choices are to take the Proposed Final Judgement as is, or reject it, I say you must reject it.

Respectfully submitted on January 28, 2002
Ralph Green, Jr.